

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



74-1668

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

----- x

KATHLEEN M. FINNERTY, individually and :  
on behalf of all other persons similarly :  
situated, :  
  
Plaintiff-Appellant, :  
  
-against- :  
  
JAMES L. COWEN, individually and as :  
Chairman of the Railroad Retirement :  
Board, and :  
  
CASPAR WEINBERGER, individually and as :  
Secretary of Health, Education, and :  
Welfare, :  
  
Defendant-Appellees. :  
----- x

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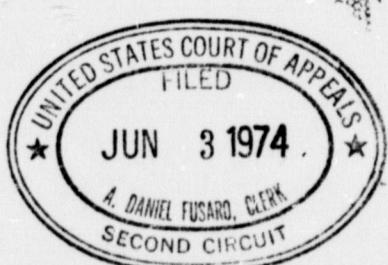
JOINT APPENDIX

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**PAGINATION AS IN ORIGINAL COPY**

APPENDIX

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**CLERK'S OFFICE**  
**United States District Court**  
**FOR THE**  
**Northern District of New York**

Kathleen M. Finnerty, Ind. and on behalf  
of all other persons similarly situated, Plaintiff  
vs. Civil Action No. 73-CV-206  
James L. Cowen, Ind. and as Chairman of the  
Railroad Retirement Board et al.

There was entered on the docket January 10, 1974  
and  
an order (judgment) dismissing amended complaint.

A.O. NO. 148

J.R. Scully, CLERK

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

----- x  
KATHLEEN M. FINNERTY, individually and :  
on behalf of all other persons similarly  
situated, :  
:

Plaintiff, :  
:

-against- : 73-CV-206

JAMES L. COWEN, individually and as :  
Chairman of the Railroad Retirement  
Board and CASPAR WEINBERGER, individu- :  
ally and as Secretary of Health, Edu-  
cation and Welfare, :  
:

Defendants. :  
----- x

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JAMES T. FOLEY, D.J.

MEMORANDUM-DECISION and ORDER

This case involves a challenge to the constitutionality of certain section of the Social Security Act and the Railroad Retirement Act. The claim, however, is

not to respective sections individually but as they jointly affect plaintiff who is eligible for benefits under both retirement programs. The primary section at issue is Section 2(e)(i)(l)(ii) of the Railroad Retirement Act, 45 U.S.C. §228(e)(i)(l)(ii), which provides for a deduction from an annuity based upon excess earnings as they might arise from employment, pursuant to Section 203 of the Social Security Act, 42 U.S.C. §403. In this way both programs provide for a reduction of benefits when a recipient has income or wages due to employment in excess of an amount fixed by Congress. Plaintiff alleges that since she is eligible for both programs, she is subject to a "double-deduction" for income earned from her employment. More precisely stated, her income, in excess of an amount fixed by Congress, is cognized by both the Social Security Administration and the Railroad Retirement Board for purposes of downward readjustment of her benefits from each program. See 42 U.S.C. §402(k)(3)(A) and 45 U.S.C. §228 (e)(g)(2).

Both the plaintiff and defendants have filed preliminary motions wherein plaintiff requests the convening of a three-judge court under 28 U.S.C. §2282 and designation to proceed as a class action under Fed. R. Civ. Pro.23; defendants move for the dismissal of the complaint on the ground that this Court lacks jurisdiction

to entertain the action. Fed. R. Civ. Pro. 12(b)(6).

Plaintiff alleges jurisdiction under no fewer than six separate statutes. While some of these are more inapplicable than others, none in my judgment confers jurisdiction upon this Court because of plaintiff's failure to exhaust administrative requirements under either the Social Security Act, 42 U.S.C. §405(g) or the Railroad Retirement Act, 45 U.S.C. §228k (referring to 45 U.S.C. §355(f) of the Railroad Unemployment Insurance Act). Bartley v. Finch, 311 F. Supp. 876 (E.D. Kentucky 1970) (three-judge court), aff'd sub nom. Bartley v. Richardson, 404 U.S. 980 (1971); Jones v. Steiner, 481 F. 2d 392, 395 n. 1 (5th Cir. 1973); Huseman v. Finch, 424 F. 2d 1237 (10th Cir. 1970); Craig v. Finch, 416 F. 2d 721, 724 (5th Cir. 1969), cert. den. 397 U.S. 953 (1970); Gaston v. Finch, 312 F. Supp. 1327, 1329 (E.D. Kentucky 1970), aff'd sub. nom. Gaston v. Richardson, 451 F. 2d 461 (6th Cir. 1971); Moore v. Celebreeze, 252 F. Supp. 593, 594 (E.D. Pa. 1966); aff'd 376 F.2d 850 (3rd Cir. 1967) (per curiam); Gregory v. Railroad Retirement Board, 201 F. 2d 52 (6th Cir. 1952) (per curiam). Additionally, with respect to the exhaustion requirement of the Railroad Retirement Act there seems to be another barrier to exercise of jurisdiction by this Court. Under Title 45 U.S.C §§ 228(k) and 355(f), appeals of Railroad Retirement Act controversies are taken

directly to the Court of Appeals. See Smith v. Smith, 459 F. 2d 1027 (5th Cir. 1972) (per curiam); Gregory v. Railroad Retirement Board, *supra*; Hoffman v. Dodd, 331 F. Supp. 393, 394 (N.D. Ill. E.D. 1971).

Plaintiff apparently realizing that the failure to exhaust administrative remedies under the Social Security Act prohibits jurisdiction under Title 42 U.S.C. §405(g) by a federal district court, alternatively by her pleading seeks jurisdiction under Title 28 U.S.C. §§1331 (Supp. 1973) (mandamus), 1337 (Commerce and Anti-trust regulations); 1343(4) (civil rights); 1331 (\$10,000 and a federal question); 1346 (2) (Tucker Act) and Title 5 U.S.C. §§701-704 (Administrative Procedure Act). However, none of these statutes confer jurisdiction per se and the limited exceptions to some of them that have grown from case law do not embrace the facts of this case.

With regard to all of these statutes except 28 U.S.C. §1331, recent cases of the Court of Appeals, Second Circuit, have rejected them as jurisdictional bases to challenge the Social Security Act. *Glover v. McMurray* \_\_\_\_ F. 2d \_\_\_, \_\_\_, Dk. Nos. 73- (1876, 1904, 1906), Slip. Op. 5553, 5560 (2d Cir. Nov. 7, 1973); *Aguayo v. Richardson*, 473 F.2d 1090, 1101-1102 (2d Cir. 1973), application for stay or injunction denied, 410 U.S. 921 (1973); *Almenares v. Wyman*, 453 F. 2d 1075, 1082 n. 9

(2d Cir. 1971), cert. denied 405 U.S. 944 (1972); McCall v. Shapiro, 416 F. 2d 246, 249 (2d Cir. 1969); see also Gaston v. Finch, *supra*, 312 F. Supp. at 1329; Wellens v. Dillon, 302 F. 2d 442 (9th Cir. 1962) (per curiam), appeal dismissed and cert. denied, 371 U.S. 11 (1962); Well v. United States, 280 F. 2d 275, 277 (9th Cir. 1960); and with particular reference to Title 28 U.S.C. 1346(2) (Tucker Act), see Richardson v. Morris, 409 U.S. 464 (1973) (per curiam).

In terms of Title 28 U.S.C. § 1331 which requires both the matter in controversy to exceed \$10,000 in value and involve a substantial issue arising under the Constitution, laws or treaties of the United States, I find neither prerequisite satisfied by the facts of this case. First, plaintiff herself does not approach having \$10,000 involved in this action. She requests designation to proceed as a class action to allow aggregation of damages of its members for purposes of §1331. See Bass v. Richardson, 331 F. Supp. 945 (S.D.N.Y. 1971), appeal dismissed as moot, 464 F. 2d 1300 (2d Cir. 1971); but see Aguayo v. Richardson, *supra*, 473 F. 2d at 1101 n. 15. This would raise very difficult questions under recent decisions, e.g., Zahn v. International Paper Co. \_\_\_\_\_ U.S. \_\_\_\_\_, 42 U.S.L.W. 4087 (Dec. 17, 1973); Snyder v. Harris, 394 U.S. 332 (1969); Almenares v. Wyman, *supra*, 453 F. 2d at 1083 n. 11, which need not be resolved here, except to mention that no facts were alleged

which would quantify the proposed class to show that the amount in controversy exceeds \$10,000 even in the event aggregation was allowed. But the more prominent deficiency in § 1331 jurisdiction is the absence of a substantial federal question. *Rosado v. Wyman*, 397 U.S. 397, 402-404 (1970), on remand 322 F. Supp. 1173 (E.D. N.Y. 1970), *aff'd* 437 F. 2d 619 (2d Cir. 1970), *aff'd* 402 U.S. 991 (1971); *Aguayo v. Richardson*, *supra*. The lack of a substantial federal question also adversely affects plaintiff's claim pursuant to 28 U.S.C. §1343 (4), *cf. Hagans v. Wyman* 471 F. 2d 347, 349 (2d Cir. 1973), cert. granted sub nom. *Hagans v. Lavine*, 412 U.S. 938 (1973), as well as the motion for a three-judge court which is not reached here. See *Goosby v. Osser*, 409 U.S. 512, 518 (1973). It is my opinion that plaintiff's challenges to these sections of the Social Security and Railroad Retirement Acts based upon a denial of equal protection [see *Bolling v. Sharpe*, 347 U.S. 497 (1954)] do not present a substantial federal question.

Standards of judicial review of Social legislation under the due process clause were set by the Supreme Court in *Flemming v. Nestor*, 363 U.S. 603 (1960). The Court cautioned that tolerance should be given to the operation of such systems because of their "highly complex and interrelated statutory structure," and concluded that:

It is not within our authority to determine whether the Congressional judgment expressed in that section is sound or equitable, or whether it comports well or ill with the purposes of the Act.... Particularly when we deal with a withholding of a non-contractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.  
(emphasis supplied)

Id., 363 U.S. at 611.

Judge Kaufman, speaking for the Court of Appeals, Second Circuit, recently observed that:

[p]ublic assistance laws, as incorporated in the Social Security Act, in rules and regulations of the Department of Health, Education and Welfare, and in various state social service programs, present as complex a legislative mosaic as could possibly be conceived by man.

City of New York v. Richardson, 473 F. 2d 923, 926 (2d Cir. 1973).

It follows that courts must give great latitude not only to the statute as passed by Congress but also to the administration of a difficult and complex program. Rothstein v. Wyman, 467 F. 2d 226, (2d Cir. 1972), cert. denied 411 U.S. 921 (1973); see also Udall v. Tallman, 380 U.S. 1, 16 (1964); Gardner v. Sloane, 396 F. 2d 641 (9th Cir. 1968), cert. denied sub nom. Sloane v. Finch, 393 U.S. 1093 (1969).

The gravamen of plaintiff's amended complaint is that she receives less money in toto as a recipient of both Social Security and Railroad Retirement benefits because both systems employ a formula to reduce benefits based on outside income from employment than would another person similarly situated in all respects (with an equal income from employment) but eligible for benefits from either Social Security or Railroad Retirement.

Plaintiff also complains that the recoupment procedure of the Railroad Retirement Board (see 20 C.F.R. Part 255) to recover erroneous payments fails to afford notice and a prior hearing. But plaintiff's position is undercut by her own failure in this instance to use existing hearing procedures (see 20 C.F.R. §250.7) and by recent case law. *Mills v. Richardson*, 464 F. 2d 995, 1001 (2d Cir. 1972); *Mother's & Children's Rights Organization v. Sterrett*, 467 F. 2d 797 (7th Cir. 1972); *Messer v. Finch*, 314 F. Supp. 511, 513 (E.D. Kentucky 1970) (three judge court) (per curiam), appeal dismissed for mootness 400 U.S. 987 (1971).

Now, despite plaintiff's failure to exhaust administrative remedies which unfortunately leaves both the facts and applicable law less than clear, even if we were to assume arguendo the allegations of plaintiff's amended complaint, there still would not be a substantial

federal question. The standard under due process/equal protection in reviewing social legislation of a non-invidious nature [see *Maracle v. Richardson*, 348 F. Supp. 234, 237 (W.D. N.Y. 1972) (three judge court) and *Morris v. Richardson*, 346 F. Supp. 494 (N.D. Ga. 1972) (three judge court), vacated and remanded 409 U.S. 464 (1973)] is simply a search for a rational basis which would justify it. As the Supreme Court has said:

[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis", it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70.

*Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

The Social Security and Railroad Retirement Acts, though conceptually different in some ways (see 1972 U.S. Code Cong. & Ad. News 3485), both provide income during old age when income tends to decrease. Their survivorship provisions might entitle some persons or families to the double benefits of two separate annuities except that Congress and the agencies involved have tried to reduce

such overlap, thereby utilizing limited financial resources more equitably. See e.g., Title 45 U.S.C. §§228e(g)(1) et seq. and 20 C.F.R. §237.607; Title 42 U.S.C. §§ 402(1), 405 (c)(5)(D) and 20 C.F.R. §§ 404.1401 et seq. However, for those eligible for benefits from both programs Congress has attempted to provide more generous benefits than one Act alone would provide, while avoiding payment of the windfall of a double annuity. See 1966 U.S. Code Cong. & Ad. News 3604; 1965 U.S. Code Cong. & Ad. News 3226. This becomes very difficult especially as increases in the benefits payable by one program (often effected at different times by Congress) must be adjusted with respect to the other. Such difficulty is illustrated by a proposed 1970 increase in social security benefits:

It is the view of the committee that, as a general matter, individuals who are entitled to both a railroad retirement annuity and social security benefits are in less need of an increase in their annuity than individuals who receive only a railroad retirement annuity. The offset for social security benefit increases lowers the costs of the legislation and thus permits larger increases for those individuals receiving only a railroad retirement annuity than would otherwise be feasible.

1970 U.S. Code Cong. & Ad. News 3745, see 1972 U.S. Code Cong. & Ad. News 3475-3490; *Flemming v. Nestor*, *supra*, 363 U.S. at 610.

Rights to Social Security or Railroad Retirement benefits are neither contractual nor vested. *Flemming v.*

Nestor, *supra*, 363 U.S. at 610-611; *Ruhl v. Railroad Retirement Board*, 342 F. 2d 662 (7th Cir. 1965), cert. den. 382 U.S. 836 (1965). It is obvious that Congress can vary benefits subject only to the due process limitation against patently arbitrary action -- utterly lacking in rational justification. *Hoffman v. Dodd*, *supra*, 331 F. Supp. at 394. Reductions of benefits based on income from employment do not violate this due process standard. *Carlough v. Richardson*, 445 F.2d 865 (5th Cir. 1971) (per curiam) cert. den. 404 U.S. 1026 (1972), reh. den. 405 U.S. 969 (1972); *Gruver v. Secretary of Health, Education and Welfare*, 426 F.2d 1195 (D.C. Cir. 1969) cert. den. 397 U.S. 977 (1970); *Gainsville v. Richardson*, 319 F. Supp. 16 (D. Mass. 1970).

Such reductions are an obvious way of allocating the limited resources of both programs among millions of recipients. A family's need for a given amount of income, its ability to obtain other sources of income, e.g., by employment, pension, workmen's compensation (see *infra* p. 8) or other sources may be taken into account as Congress tries to balance available funds and changing disbursements. Given the difficulty of operating such programs (see *Flemming v. Nestor*, *supra*, 363 U.S. at 610), such anomalies or inequities that might ensue to certain members of a classification covered by the Act are not within the purview of judicial review. *Hagans v. Wyman*, *supra*; *Velazco v.*

Minter, 481 F. 2d 573, 577 (1st Cir. 1973). Indeed when the complexities of these two programs produce certain anomalies in coverage because of interaction, it is up to Congress to make readjustments. Kolonitis v. Railroad Retirement Board, 346 F.2d 367, 368 (7th Cir. 1965); see also 1965 U.S. Code Cong. & Ad. News 3226-3227. The Social Security Act makes deductions from benefits to the full amount of any workmen's compensation payments, but no deductions for private insurance payments on the same injury. While recognizing the harsh effect this result has in many instances the Supreme Court, as well as many lower courts, have not found a violation of the equal protection standard. Richardson v. Belcher, 404 U.S. 78 (1971); Grant v. Weinburger, 482 F. 2d 1290 (6th Cir. 1973) (per curiam); Lofty v. Richardson, 440 F. 2d 1144 (6th Cir. 1971); Bailey v. Finch, 312 F. Supp. 918 (N.D. Miss. 1970); Gambill v. Finch, 309 F. Supp. 1 (E.D. Tenn., N.D. 1970). If these cases of benefit reductions do not fall within the ambit of equal protection a fortiori, plaintiff's claim is unpersuasive as a significant federal question.

While it is difficult to rule against social security and railroad retirement claimants -- as the amounts at issue are small, the circumstances engender sympathy and plaintiff here is represented by Legal Aid for the Elderly Poor [See Gettinger v. Celebreeze, 218 F. Supp. 161, 164 (S.D.N.Y. 1963), aff'd 330 F. 2d 959 (2d Cir. 1964)] --

nevertheless, the cases cited herein convince me that there is no substantial constitutional question of due process or equal protection presented to resolve and even if there were, the failure to exhaust administrative remedies surely removes to my mind any jurisdictional basis to entertain them.

Therefore, defendants' motion to dismiss the amended complaint for want of jurisdiction is granted and the amended complaint is dismissed. Plaintiff's motions for designation as a class action and for the convening of a three-judge court are denied and dismissed.

It is so Ordered.

Dated: January 9, 1974

Albany, New York

/s/ James T. Foley  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

KATHLEEN M. FINNERTY, individually  
and on behalf of all other persons  
similarly situated,

Plaintiff,  
-against-

JAMES L. COWEN, individually and as  
Chairman of the Railroad Retirement  
Board and  
CASPAR WEINBERGER, individually and  
as Secretary of Health, Education,  
and Welfare,

Defendants.

AMENDED  
COMPLAINT

Civil Action No. 73-206

PRELIMINARY STATEMENT

The plaintiff, in a class action, seeks to have this Court declare invalid and enjoin the administration of the Railroad Retirement Act and the Social Security Act which reduces plaintiff's pension benefits under both Acts if she earns more than a specified amount each year. These provisions are challenged because (1) benefits are reduced without prior notice and hearing; (2) benefits are reduced even more greatly for a recipient receiving both Railroad Retirement and Social Security benefits than for someone receiving benefits under only one Act; benefits are reduced only for recipients aged 72 or younger, and only for income from employment, thereby violating the fundamental constitutional rights to Due Process and Equal Protection.

JURISDICTION

1. Jurisdiction is conferred on this Court by 28 U.S.C. 1361 giving the district courts original jurisdiction in the nature of mandamus to compel an officer of the United States or any agency thereof to perform a duty owed to plaintiff.

Jurisdiction is also conferred by §10 of the Administrative Procedure Act (S.U.S.C. §§701-704), which provides review of determinations. Jurisdiction is also conferred under 28 U.S.C. 1337 involving the regulation of commerce and by 28 U.S.C. 1343(4) providing equitable or other relief under any Act of Congress providing for the protection of civil rights. Jurisdiction is further conferred under 28 U.S.C. 1331 as the amount in controversy exceeds the sum of \$10,000, exclusive of costs and interests, or in the alternative under 28 U.S.C. 1346(2).

THREE-JUDGE COURT

This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. 2282 and 28 U.S.C. 2284, since plaintiff seeks an injunction to restrain defendants from the enforcement, operation or execution of an Act of Congress for repugnance to the Constitution of the United States which injunction would have widespread effect over the nation on the administration of Social Security and the Railroad Retirement Acts.

PLAINTIFF

Plaintiff Kathleen Finnerty is a citizen of the United States and a resident of the State of New York. Plaintiff receives both Social Security Retirement and Railroad Retirement Annuity Fund benefits. Plaintiff's benefits were reduced because of income from wages and self-employment when plaintiff was under age 72. Plaintiff is now 74 years old and continues to have these past reductions withheld.

CLASS ACTION

The named plaintiff brings this action on her own behalf and pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all other persons similarly situated. The members of the class similarly situated are all persons who receive both Social Security Retirement benefits and Railroad Retirement benefits. The class is further divided into two subclasses comprised of persons under the age of 72 receiving reduced benefits because of income from wages and self-employment and those persons who continue to have past reductions withheld. All members of the class are subject to reduction of benefits without a prior hearing. The requirements of Rule 23 are met in that the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative party are typical of the claims of the class; the representative party will fairly and accurately protect the interests of the class; and the party opposing the class has acted on grounds

generally applicable to the class. The relief requested necessarily affects the entire class by requiring the orderly administration of the Social Security and Railroad Retirement Acts consonant with fundamental constitutional rights of due process necessarily affecting all members of the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

#### DEFENDANTS

Defendant Caspar Weinberger is Secretary of the Department of Health, Education and Welfare and responsible for the operation of the Social Security Retirement System.

Defendant James L. Cowen is responsible for the operation of the Railroad Retirement Annuity Fund.

#### FACTUAL ALLEGATIONS

1) Plaintiff Kathleen Finnerty is entitled to and has been receiving a total monthly grant of \$152.75 from Social Security and the Railroad Retirement Annuity Fund.

2) Pursuant to 45 U.S.C. §288e(g)(2) the plaintiff's total benefits under the Railroad Retirement Act are correlated with her benefits under the Social Security Act so that at no time is the total amount received from both programs greater than plaintiff's maximum entitlement under either program.

3. Under the Social Security Act an individual under the age of 72 who continues to work and receives wages or income from self-employment, has his retirement benefits reduced depending on the amount of his earnings. No reduction is made for non-employment income, or in cases of individuals over age 72.

4. In 1970, plaintiff was under 72 and earned \$1,946.60 which was \$266.60 above the \$1,680.00 any claimant could earn without a deduction from Social Security benefits. Plaintiff reported these excess earnings and, in accordance with 42 U.S.C. §403(f), plaintiff was charged with \$133.00 by the Social Security Administration.

5. In a notice dated June 1, 1972, plaintiff was informed by the Railroad Administration Board, that based on the 1970 earnings reported to the Social Security Administration, plaintiff had been overpaid in the amount of \$133.00 and that commencing June 1, 1972 plaintiff's monthly annuity payments would be withheld for two months to recover the alleged over-payment.

6. The determination that plaintiff had excess earnings was made pursuant to 45 U.S.C. §288(e)(i)(l)(ii) which provides for a reduction of benefits for any month in which an individual is under age 72 and is charged with an excess earnings under the Social Security Act, 42 U.S.C. §403(e). This section has

the effect of depriving plaintiff of all her excess earnings of \$266.60 over the exempt amount for the year 1970.

7. Had plaintiff received benefits solely from either Social Security or Railroad Retirement Funds, only one-half or \$133.30 of her earnings in excess of \$1,680.00 <sup>1/</sup> would have been deducted.

8. The statutory scheme for the reduction of benefits because of excess earnings has been applied to plaintiff twice, resulting in a double deduction from her benefits.

9. The notice from the Railroad Retirement Board, dated June 1st, 1972 (Exhibit A annexed), which advised plaintiff that her annuity payments would be withheld to recoup the alleged overpayment, was immediately effective as of June 1, 1972. There was no prior notice or opportunity for a hearing where plaintiff could present her case before the suspension of benefits.

10. Recovery of overpayment by the Railroad Retirement Board may be waived in cases where such recovery "would be contrary to the purpose of the Act or would be against equity or good conscience." 42 U.S.C. 288(i)(c). The Regulations of the Railroad Retirement Board further provides for alternate methods for repayment of overpayments. 20 C.F.R. 255.4 - .9, 255.13 - 14.

11. The Railroad Retirement Act and Board Regulations provides for administrative review after a reduction or suspension.

<sup>1/</sup> All figures are based on the statute as it was in 1970 and do not reflect the increases in income exemption levels conferred by the 1972 amendments.

of benefits, 42 U.S.C. 223(i)(c), 20 C.F.R. 255.10 - .12, but plaintiff was not advised of her right to this review to challenge the reduction of benefits or the method of recoupment.

FIRST CAUSE OF ACTION

For a first cause of action plaintiff alleges:

- (1) The Railroad Retirement Act does not provide for notice and a hearing prior to any reduction in benefits to recoup alleged overpayments.
- (2) Before plaintiff may be deprived of essential government benefits, she is entitled to notice of the reasons for the deprivation, and an opportunity to present her case to an impartial decision maker, including the right to counsel, to pre-hearing discovery, and to confront and cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made.
- (3) The failure to provide plaintiff with prior notice or an opportunity for a hearing before reducing her Railroad Retirement benefits denies plaintiff due process, in violation of the Fifth Amendment to the United States Constitution.

SECOND CAUSE OF ACTION

For a second cause of action plaintiff alleges:

(1) The Social Security Act and Railroad Retirement Act operate concurrently so that persons receiving benefits under both programs receive no more than the maximum they would be entitled to under either program. But if persons receiving benefits under both programs have earnings from employment in excess of \$1,680.00, a reduction is made in the benefits payable under both programs. A person receiving benefits under both programs loses twice as much money as a person receiving the identical amount of benefits under one program.

(2) Since no rational basis exists from treating persons who happen to receive benefits under both the Railroad Retirement Act and the Social Security Act differently from those receiving the same amount of benefits under one program; the double deduction denies plaintiffs due process and equal protection in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

THIRD CAUSE OF ACTION

- (1) The Railroad Retirement Act and Social Security Act provide for reduction in benefits based on employment income for those under age 72.
- (2) The distinction between those under age 72 and over age 72 has no rational basis, and deprives those under age 72 of equal protection, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

FOURTH CAUSE OF ACTION

- (1) The Railroad Retirement Act and Social Security Act provide for reduction in benefits based on income from wages or self-employment earnings while there is no deduction for income received from all other sources.
- (2) The distinction between employment earnings and all other income has no rational basis, interferes with a person's pursuit of his chosen profession, trade or business and deprives plaintiffs of their property without due process and equal protection in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution.

FIFTH CAUSE OF ACTION

(1) The Railroad Retirement Act and Regulations promulgated pursuant to it provides for an administrative determination on waiver of recoupment and alternative methods of recoupment of overpayments.

(2) The failure to advise plaintiffs of their right to request either waiver or an alternative method of recoupment deprives plaintiffs of due process and equal protection under the law in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE plaintiff respectfully prays on behalf of herself and all other persons similarly situated that this Honorable Court:

(1) Assume jurisdiction of this cause, convene a three-judge district court pursuant to 28 U.S.C. 2282 and 28 U.S.C. 2284 to determine this controversy, and set this case promptly down for hearing.

(2) Determine by order pursuant to Rule 23(c)(1) of the Rules of Civil Procedure, that this action be maintained as a class action.

(3) Enter a final judgement pursuant to 28 U.S.C. 2201 and 2202 and Rules 54, 57, and 58 of the Federal Rules of Civil Procedure declaring (a) that 45 U.S.C. 228e(i)(1)(ii) and 42 U.S.C. 403(e) providing for double deduction for those receiving both Railroad Retirement and Social Security benefits are invalid as violative of the Fifth and Fourteenth Amendments to the United States Constitution; (b) that 45 U.S.C. 228e(i) providing a reduction in Railroad Retirement benefits without prior notice or hearing is invalid on the ground that this section denies due process guaranteed in the Fifth and Fourteenth Amendments to the United States Constitution; (c) that 45 U.S.C. 2283(i) and 42 U.S.C. 403(e) providing a reduction in benefits of persons under age 72 for excess earnings from employment is invalid on the grounds that it violates the provisions of the First, Fifth and Fourteenth Amendments to the United States Constitution.

(4) Enter preliminary and permanent injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure

(A) enjoining defendants, their successors in office, agents and employees and all other persons in active

concert and participation with them (i) from reducing or terminating Railroad Retirement benefits without providing prior notice and an opportunity to be heard by an impartial decision-maker at a hearing comporting with due process requirements and providing a right to counsel, to pre-hearing discovery, and to confront and cross-examine adverse witnesses, culminating in administrative findings and conclusions based upon the record so made; (ii) from reducing benefits of persons receiving benefits under both the Railroad Retirement Act and Social Security Act by double the amount of persons receiving benefits under only one program; (iii) from reducing benefits of persons under age 72 under either program based on excess earnings from employment, and (iv) from continuing to withhold monies deducted from past benefits because of excess earnings from employment;

(B) requiring defendants, their successors in office and employees and all other persons in active concert and participation with them (i) to restore and continue full benefit levels to plaintiffs until notice and opportunity for a hearing complying with Due Process standards are afforded; (ii) to release monies wrongfully withheld because of entitlement

to benefit derived from both the Railroad Retirement Act and the Social Security Act so that those persons receive the full benefits of persons entitled under one act; (iii) to notify all persons of their right to request administrative review, waiver of recoupment and alternative methods of recoupment; (iv) to notify all persons adversely affected in the past, of their right to administrative review and repayment of monies wrongfully withheld.

(5) Allow plaintiff her costs herein and grant her and all persons similarly situated such additional or alternative relief, including payment of all monies wrongfully withheld, and notification to all persons who have been adversely affected in the past of their full rights to administrative review, waiver and recoupment alternatives.

Respectfully submitted,

*Thomas M. Santoro, Esq.*  
THOMAS M. SANTORO, Esq.  
38 Chapel Street  
Albany, New York 12207  
Telephone - (518) 434-0153

Attorney for Plaintiff

Of Counsel:

Jonathan A. Weiss, Esq.  
Toby Golick, Esq.  
Legal Services for the Elderly Poor  
2095 Broadway  
New York, New York 10023  
Telephone - (212) 595-1340

UNITED STATES OF AMERICA  
RAILROAD RETIREMENT BOARD  
644 RUSH STREET  
CHICAGO, ILLINOIS 60611

JUN 1 1972

BUREAU OF RETIREMENT CLAIMS

Mrs. Kathleen M. Finnerty  
Box 132  
Williamstown, New York 13493WHEN WRITING TO THE BOARD  
ALWAYS GIVE

THIS CLAIM NO. → A-675816

The Social Security Administration has furnished us with a report of your earnings for the year 1970. The earnings reported by SSA are higher than the earnings you reported to the Board:

Reported by You

-0-

Reported by SSA

\$1,946.60

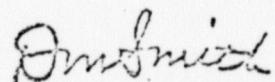
Consequently, you have been overpaid \$ 133.00. In determining the amount of the overpayment, we have considered any previous deductions which may have been made in your case.

Your annuity will be withheld effective June 1, 1972 for 2 months. Your annuity will be reinstated upon recovery of the overpayment on or about August 10, 1972. If you do not wish to have your annuity suspended that long, you can refund the overpayment. Send a check or money order payable to the Railroad Retirement Board in the enclosed envelope.

The enclosed pamphlet explains how annuity payments are affected because of excess earnings. Should you need further information contact the nearest Board office. If you call in person, take this letter with you and any record you have of your earnings for the year 1970.

~~If you worked in 1971 and earned more than \$1,680, you should report your earnings for that year to the Board as soon as possible, unless you have already done so. Use the form in the pamphlet for this purpose.~~

Very truly yours,

D. M. Smith  
Director of Retirement Claims

Enclosures

G-74

-A 28-

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

-----X  
KATHLEEN M. FINNERTY, individually :  
and on behalf of all other persons :  
similarly situated, :  
: Plaintiff, :  
-against- : NOTICE OF MOTION FOR  
JAMES L. COWEN, individually and as : CLASS ACTION & CONVENING  
Chairman of the Railroad Retirement : OF THREE-JUDGE COURT  
Board and : Civil Action No. 73CV206  
CASPAR WEINBERGER, individually and :  
as Secretary of Health, Education, :  
and Welfare, :  
: Defendants. :  
-----X

To the above-named defendants:

Please take notice that the plaintiff will bring on  
for hearing at the United States Courthouse, Northern District  
of New York, at Albany, New York, on the 4 day of September, 1973,  
at 10:30 o'clock, or as soon thereafter as counsel can be  
heard, the attached motion seeking an order declaring that this  
action be maintained as a class action, and requesting the  
convening of a statutory court of three judges.

Please take further notice that opposing affidavits  
and answering memoranda must be served upon counsel for  
plaintiff at least one day before the return day of this  
motion.

THOMAS M. SANTORO, Esq.  
33 Chapel Street  
Albany, New York 12207  
Tel. (518) 434-0153  
Attorney for Plaintiff

Of Counsel:

JONATHAN A. WEISS  
TOBY GOLICK

Legal Services for the Elderly  
Poor  
2095 Broadway, Rm. 304  
New York, New York 10023  
Tel. (212) 595-1340

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

-----X  
KATHLEEN M. FINNERTY, individually :  
and on behalf of all other persons :  
similarly situated, :  
: Plaintiff, : MOTION FOR CLASS ACTION &  
-against- : CONVENING THREE-JUDGE  
: COURT  
: JAMES L. COWEN, individually and as : Civil Action No. 73CV206  
Chairman of the Railroad Retirement :  
Board and :  
CASPAR WEINBERGER, individually and :  
as Secretary of Health, Education, :  
and Welfare, :  
: Defendants. :  
-----X

Plaintiff Kathleen M. Finnerty moves the court to  
grant the following relief:

- 1. An order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure determining that this action may properly proceed as a class action pursuant to Rule 23(a), (b)(2) because: the class, consisting of all persons who receive both Social Security and Railroad Retirement Benefits, and further subdivided into two subclasses comprised of persons under the age of 76 receiving reduced benefits because of income from wages and self-employment and those persons who continue to have past reductions withheld, is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative party are typical of the claims of the class; the representative party will fairly and adequately protect the interests of the class; and the party opposing the class

has acted on grounds generally applicable to the class. The relief requested necessarily affects the entire class by requiring the orderly administration of the Social Security and Railroad Retirement Act comporting with fundamental constitutional rights of due process making appropriate final injunctive and declaratory relief with respect to the class as a whole.

2. Request the Chief Judge of the Circuit to convene a statutory court of three judges for the purpose of hearing and determining this application for a preliminary and permanent injunction and this cause, in accordance with the provisions of Title 28 United States Code Sections 2231 and 2234 which require the convening of such a court when an interlocutory and permanent injunction are sought to restrain enforcement of an act of Congress for repugnance to the Constitution of the United States which injunction would have widespread effect over the nation on the administration of the Social Security and Railroad Retirement Acts. The preliminary and permanent injunctions are sought to restrain the defendants, who are federal administrators, their successors in office, agents and employees, and all other persons in active concert and participation with them, from reducing or suspending benefits to plaintiff and all members of the class without prior notice or evidentiary hearing; from reducing benefit levels because of earned income more for a member of plaintiff's class than for someone

receiving benefits under only one act, and from continuing to withhold past reductions; from reducing and continuing to withhold past reductions only for recipients under the age of 72 and only for income from employment.

Plaintiff seeks this relief for himself and all others similarly situated on the grounds that:

(a) he and all others similarly situated are each suffering, or are imminently threatened with suffering, irreparable damage in that they are without means to provide themselves with the basic necessities requisite for a minimum standard of decency and health and will continue to suffer even greater deprivation unless they continue to receive full benefit levels and have the monies previously withheld restored to them.

(b) the Railroad Retirement Board, which deprives plaintiffs and all others similarly situated of full benefits because of alleged overpayments without prior notice or a prior evidentiary hearing and the statute 45 U.S.C. §228(e)(i)(l)(ii) and 42 U.S.C. §403e which deprive plaintiff and all others similarly situated of full benefits on the grounds that they are entitled to both Social Security and Railroad Retirement benefits and receive employment income while under the age of 72, violate the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and the Railroad Retirement Act §228(i)(c) and regulations promulgated pursuant to it;

(c) plaintiff has no adequate remedy at law, as set forth more fully in the verified complaint and the affidavit of Kathleen Finnerty, attached hereto.

THOMAS M. SANTORO, Esq.  
38 Chapel Street  
Albany, New York 12207  
Tel. (518) 434-0153  
Attorney for Plaintiff

Of Counsel:  
JONATHAN A. WEISS  
TOBY GOLICK  
Legal Services for the Elderly  
Poor  
2095 Broadway, Rm. 304  
New York, New York 10023  
Tel. (212) 595-1340

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

----- x  
KATHLEEN M. FINNERTY, individually  
and on behalf of all other persons  
similarly situated, :

Plaintiff, :  
-against- : A F F I D A V I T

JAMES L. COWEN, individually and as  
Chairman of the Railroad Retirement  
Board and : Civil Action No.  
73CV206

CASPAR WEINBERGER, individually and  
as Secretary of Health, Education,  
and Welfare, :

Defendants.:

----- x  
STATE OF NEW YORK ) ss.:  
COUNTY OF )

KATHLEEN M. FINNERTY, being duly sworn, deposes and  
says:

1. That deponent is the plaintiff in the above-titled action.
2. That deponent receives a total monthly grant of \$152.75 based on joint entitlement to Railroad Retirement and Social Security benefits.
3. That in 1970, deponent was under age 72 and earned \$1,946.60 from employment; that this was \$266.60 above the \$1,680.00 earnings exemption under the Social Security Act and, in accordance with 42USC 403f, deponent was charged by the Social Security Act with \$133.00 or one-half of deponent's "excess earnings."

4. That in a notice dated June 1, 1972, deponent was informed by the Railroad Retirement Board that, based on a 1970 earnings report from Social Security, deponent had been overpaid in the amount of \$133.00 and that effective immediately deponent's benefits would be suspended for two months to recoup the alleged overpayments.

5. That the aforementioned notice did not advise deponent of any right to contest the grounds for recoupment, or to apply for waiver of recoupment or alternative methods of recoupment.

6. That deponent depends upon her monthly Railroad Retirement annuity to meet her daily needs and to purchase those necessities that a person of her age requires for a minimum standard of decency and health; that deponent suffers great and irreparable harm from any summary suspension, reduction or termination of benefits.

---

KATHLEEN M. FINNERTY

Sworn to before me this  
day of , 1973.

---

NOTARY PUBLIC

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

KATHLEEN M. FINNERTY, individually  
and on behalf of all other persons  
similarly situated,

Plaintiff,

CIVIL NO. 73-CV-206

-against-

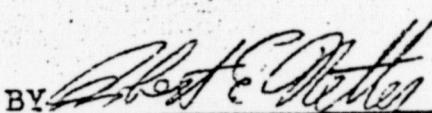
MOTION TO DISMISS

JAMES L. COWEN, individually and as  
Chairman of the Railroad Retirement  
Board and CASPAR WEINBERGER, individually  
and as Secretary of Health, Education and  
Welfare,

Defendants.

Defendant moves the Court to dismiss the action because  
the Court lacks jurisdiction to entertain said action as more  
particularly appears from the Memorandum of Law and the  
attached Affidavit of Robert P. Flynn and the records of the  
Railroad Retirement Board.

JAMES M. SULLIVAN, JR.  
United States Attorney

BY   
ROBERT E. NEITER  
Assistant U.S. Attorney  
Attorneys for Defendant  
Post Office & Court House  
Albany, New York 12207

THE UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF NEW YORK

KATHLEEN FINNERTY, et al.,

Plaintiff

Civil No. 73-LV-206

CASPAR WEINBERGER, Secretary of  
Health, Education, and Welfare,

Defendant

AFFIDAVIT OF ROBERT P. FLYNN

Baltimore County )  
                      ) ss  
State of Maryland )

I, Robert P. Flynn, being duly sworn, depose and say that I am the Executive Officer of the Bureau of Retirement and Survivors Insurance of the Social Security Administration, and as such, in conjunction with the Director and the Deputy Director am responsible for the formulation of policies and procedures whereby retirement, dependent and survivors' claims under Title II of the Social Security Act are adjudicated. Such responsibilities also include the supervision of the Program Centers of the Social Security Administration in their adjudication of Title II claims. In connection with my official duties, I have legal custody of certain records, documents, and other information established and maintained by the Department of Health, Education, and Welfare, pursuant to Title 42, United States Code, section 405.

(1) The files maintained by the Social Security Administration with respect to Mrs. Kathleen Finnerty, which have been examined under my supervision, reveal that Mrs. Finnerty, born May 11, 1898, filed an application for retirement insurance benefits on August 2, 1960. On her application she indicated that she had been employed intermittently at the United States Post Office in Williamstown, New York, and that she was also self-employed in the business of making and selling clowns and soft dolls. She agreed to file an annual report of earnings when required. Retirement benefits are payable under section 202(a) of the Act, 42 U.S.C. 402(a), to an individual who is fully insured, has attained age 62 and who has filed application. Mrs. Finnerty was found entitled to retirement insurance benefits effective with May 1960 at a rate of \$42.40 per month.

(2) Under section 203(b) of the Act, 42 U.S.C. 403(b) work deductions are imposable against monthly benefits if a retirement benefits recipient earned in excess of certain annual exempt amounts. Between 1960 and 1964 Mrs. Finnerty's earnings were less than the annual exempt amount, therefore no work deductions were imposed. In 1965 Mrs. Finnerty's wages were \$1,603.99. The annual exempt amount of earnings at that time was \$1,200.00, therefore work deductions were imposed. During the years 1966-1969 Mrs. Finnerty's earnings were again less than the annual exempt amount, therefore no work deductions were imposed.

(3) Mrs. Finnerty did not file a timely annual report of earnings for the year 1970. However her social security earnings record maintained by the Social Security Administration indicated that she had earnings in 1970 in excess of the then annual exempt amount of \$1,680.00.

(4) On October 22, 1971, pursuant to the Administration's request, Mrs. Finnerty filed an annual report of earnings for 1970 which showed that she earned a total of \$1,827.08 in that year. Mrs. Finnerty also indicated in her annual report that she earned in excess of the monthly exempt amount (then \$140.00) only in March, June, July, September, November and December of that year. Since Mrs. Finnerty attained age 72 in May 1970 and under section 203(f)(1)(B) of the Act, 42 U.S.C. 403(f)(1)(B), work deductions are not imposable beginning with the month a beneficiary attains age 72, work deductions were imposable only for the month of March 1970. Since Mrs. Finnerty reported approximately \$146.00 in excess earnings, a deduction of \$73.00 was assessed from the monthly benefit otherwise payable for March 1970. (Under section 203(b), in effect at that time and as applied to Mrs. Finnerty \$1.00 for each \$2.00 of the first \$1,200.00 in excess earnings was subject to work deductions.)

(5) Mrs. Finnerty never protested the imposition of these work deductions. Though made aware of her right to do so at the time the work deductions were assessed she never protested, requested reconsideration or requested an administrative hearing on this issue. She also never requested that the overpayment be waived pursuant to applicable Social Security Regulations.

(6) Subsequent to work deductions being imposed as described above it was discovered by Social Security that a discrepancy existed between the amount shown on Mrs. Finnerty's annual report (\$1,827.08) and on her earnings record maintained by the Social Security Administration (\$1,946.60). This discrepancy was not resolved because of an administrative tolerance rule which provides that development to resolve discrepancies not be undertaken

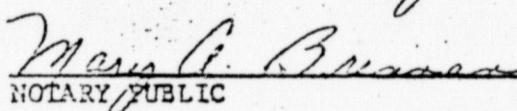
when an annual report is processed manually and the dollar amount of any further recoupment is less than \$30.00. Mrs. Finnerty's case came within the limits of this tolerance rule because, as set out in paragraph 4, work deductions could only be imposed from her benefits for the month of March 1970 due to Mrs. Finnerty's reaching age 72 in May 1970 and not earning more than \$140.00 in any month prior to May 1970 except March 1970. Mrs. Finnerty's total monthly benefit at that time was \$82.70. Since work deductions in the amount of \$73.00 had already been assessed against the March 1970 benefit only \$9.70 remained available for assessment from benefits payable for that month. That amount was less than the \$30.00 amount in the administrative tolerance rule, below which adjustment will not be made. Therefore, since additional work deductions could not have been assessed, no action was taken to resolve the discrepancy concerning Mrs. Finnerty's earnings for 1970.

(7) Since May 1970 Mrs. Finnerty has been entitled to her full retirement benefit without the imposition of work deductions.



ROBERT P. FLYNN

Subscribed and sworn to before  
me this 31<sup>st</sup> day of August 1973.



Mary G. Branson  
NOTARY PUBLIC

My Commission Expires June 30, 1994

## APPLICATION FOR WIDOW'S OR WIDOWER'S INSURANCE ANNUITY

(THIS MAY ALSO BE CONSIDERED AN APPLICATION FOR ANY INSURANCE BENEFITS PAYABLE  
UNDER TITLE II OF THE SOCIAL SECURITY ACT, AS AMENDED)

ALL ITEMS REQUIRING AN ANSWER MUST BE ANSWERED OR MARKED "UNKNOWN." RETURN THIS

FORM TO THE RAILROAD RETIREMENT BOARD.

A-675816.

(DO NOT WRITE IN THIS SPACE)

OFFICIAL USE ONLY

Date 5/29/66

By 721-1164

Syracuse, N.Y. Field Office

KATHLEEN

MARIE

FINNERTY

(PRINT YOUR FIRST - MIDDLE - LAST NAME)

I, hereby apply for any annuities or lump

sums payable to me under the provisions of the Railroad Retirement Act, as amended.

## INFORMATION ABOUT DECEASED EMPLOYEE

1. Name:	GEORGE	FRANCIS	FINNERTY	712-18-3182	
	(PRINT FIRST - MIDDLE - MAIDEN LAST NAME IF FEMALE - LAST NAME)			(SOCIAL SECURITY ACCOUNT NO.)	
2. Date and place of birth:	02 22 83		REDFIELD	N.Y.	
	MONTH - DAY - YEAR		(CITY OR TOWN)	(STATE OR FOREIGN COUNTRY)	
3. Date and place of death:	02 18 66		WILLIAMSTOWN	N.Y.	
	MONTH - DAY - YEAR		(CITY OR TOWN)	(STATE OR FOREIGN COUNTRY)	
4. In what State or foreign country did the deceased employee have his fixed, permanent home when he died?	N.Y.				
5. Was the deceased employee survived by:	<sup>22</sup> NO (a) An unmarried child under age <sup>18</sup> <sup>NO</sup> If "Yes," give name and address of such child:  (b) An unmarried child, age 18 or older, who is unable to engage in any regular employment because of a disability which began before age <sup>18</sup> <sup>NO</sup> If "Yes," give name and address of such child:				
6. (a) Did the deceased employee serve in the active military or naval service of the United States after September 7, 1939? <sup>NO</sup> If "Yes," answer (1), (2), and (3) below:	(1) Give: <span style="float: right;">(DATE OF ENTRY)</span> (BRANCH OF SERVICE) <span style="float: right;">(PLACE OF ENTRY)</span>  (PLACE OF ENTRY) <span style="float: right;">(DATE OF DISCHARGE)</span> <span style="float: right;">(PLACE OF DISCHARGE)</span>  (MILITARY ORGANIZATION OR VESSEL AT TIME OF DISCHARGE) <span style="float: right;">(SERIAL NO. - IF NONE, GIVE RANK)</span>				
(2) Was the deceased employee receiving a monthly benefit from any Federal agency other than the Railroad Retirement Board? <sup>NO</sup> If "Yes," give name of agency:					
(3) Have you or any other person received, or do you or any other person expect to receive, benefits by reason of the death of the employee from any Federal agency other than the Railroad Retirement Board? <sup>NO</sup> If "Yes," give name of agency:					
(b) Did the employee, after September 15, 1940, serve in the active military or naval service of a country allied with the United States during World War II? <sup>NO</sup> If "Yes," was the employee a citizen of the United States at the time he entered such service? <sup>NO</sup> If your answer to both questions is "Yes," give the name of the country for which he served:					
Date of entry into service	Date of discharge				

7. List all of the employment performed by the deceased employee during the last 3 years in which he worked:

NAMES OF PERSONS OR COMPANIES FOR WHICH THE EMPLOYEE WORKED	ADDRESSES	WORK BEGAN		WORK ENDED	
		MONTH	YEAR	MONTH	YEAR
	UNICA, N.Y.			53	56

Did the deceased employee receive income, as a self-employed person (whether as sole owner or partner), from a  
trade or business during the year in which he died or during the 2 years preceding the year of his death? NO  
(YES OR NO)

If "Yes," give the following information:

(a) Kind of trade or business: \_\_\_\_\_

(b) Period of self-employment: From \_\_\_\_\_ to \_\_\_\_\_

Give the following information about each marriage of the deceased employee, including the marriage in effect at  
the time of his death:

DATE OF MARRIAGE (MONTH-DAY-YEAR)	TO WHOM MARRIED	PLACE OF MARRIAGE (TOWN OR CITY) ROCHESTER	HOW MARRIAGE ENDED (DEATH, DIVORCE, ANNULMENT)	MARRIAGE ENDED (MONTH-DAY-YEAR)
UNKNOWN	SADIE SALTZMAN	(COUNTY) MORROE (STATE OR FOREIGN COUNTRY) NY	DEATH	(PLACE) UNTICA, NY (MONTH-DAY-YEAR)
1930-16	KATHLEEN M. LARKIN	(TOWN OR CITY) WILLIAMSTON	DEATH	(PLACE) WILLIAMSTON, NY (MONTH-DAY-YEAR)
		(COUNTY) (STATE OR FOREIGN COUNTRY)		(PLACE)

#### INFORMATION ABOUT APPLICANT

1. If you are the employee's widow, give your full maiden name: KATHLEEN MARIE LARKIN

2. Your date and place of birth: 05 11 98 ANACONDA MONTANA  
(MONTH-DAY-YEAR) (TOWN OR CITY) (STATE OR FOREIGN COUNTRY)

3. Were you married before your marriage to the deceased? YES If "Yes," give the following information about  
each of your previous marriages:

DATE OF MARRIAGE (MONTH-DAY-YEAR)	TO WHOM MARRIED	PLACE OF MARRIAGE (TOWN OR CITY) NEW YORK CITY	HOW MARRIAGE ENDED (DEATH, DIVORCE, ANNULMENT)	MARRIAGE ENDED (MONTH-DAY-YEAR)
1930-02-20	PATRICK J. HATKON	(COUNTY) (STATE OR FOREIGN COUNTRY) NY	DEATH	(PLACE) NEW YORK, NY (MONTH-DAY-YEAR)
		(TOWN OR CITY)		(PLACE)
		(COUNTY) (STATE OR FOREIGN COUNTRY)		(MONTH-DAY-YEAR)

3. Was your marriage to the deceased employee performed by a clergyman or authorized public official? NO  
(YES OR NO)

4. If "No," explain: \_\_\_\_\_

5. Have you remarried since the death of the deceased employee? NO If "Yes," when did you remarry?  
(MONTH-DAY-YEAR)

6. Were you and the deceased employee living together at the same address when the deceased employee died?  
NO If "No," answer (a), (b), and (c):

(a) State why you and the deceased employee were not living together and when you separated: \_\_\_\_\_

(b) Was the deceased employee under order by any court to contribute to your support?  
NO If "Yes," a certified copy of the court order should be furnished.

(c) Were you an employee contributing to your support? (Contributions may be in cash  
or in kind, such as your living rent free in a house owned by the deceased employee.)  
NO If "Yes," state how much is contributed and in what amount: \_\_\_\_\_

from the deceased employee, or in your own name, or in the name of another person? If "Yes," give your title, and tell me how you are related to the deceased employee.

17. Have you ever had a social security account number of your own? If "Yes," give your ENTITLED NUMBER PROPERTY 330 NAME ADDRESS SOCIAL SECURITY ACCOUNT NUMBER

18. Have you received or do you expect to receive benefits under the Railroad Retirement Act based on the employment of someone other than the deceased employee? If "Yes," give name of person on whose account you received or expect to receive benefits and his social security account number:

19. Have you received, or do you expect to receive, benefits under the Social Security Act based on your own employment? YES

(a) For your own employment? YES OR NO NO

(b) For another person's employment (not your own or the deceased employee's)? YES OR NO NO

If (b) is answered "Yes," give name of person on whose account you received or expect to receive benefits and his social security account number:

20. In the present calendar year did you work, or do you expect to work, in employment for hire or as a self-employed person? (This includes all work even though it may or may not be covered under the Social Security Act or the Railroad Retirement Act.) YES If "Yes," give the following information: YES OR NO

(a) For the present calendar year, give:

NAME AND ADDRESS OF EMPLOYER OR KIND OF SELF-EMPLOYMENT	SHOW MONTH OR MONTHS IN WHICH YOU WORKED SINCE JANUARY FOR THIS YEAR BY ENTERING A CHECK MARK (✓) IN THE APPROPRIATE COLUMN											
	JAN.	FEB.	MAR.	APR.	MAY	JUNE	JULY	AUG.	SEPT.	OCT.	NOV.	DEC.
U. S. POST OFFICE	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
YONKERS, N.Y.												

(a) If you were employed in the railroad industry this year (or expect to be so employed), give the date last worked and the months you still expect to work, if any, in such employment. (If you have not worked and do not expect to work in such employment, write "None.") NONE

(b) For this entire year (January 1 through December 31) do you expect your total earnings from employment for hire and self-employment to exceed \$1500 NO If "Yes," answer (1), (2), and (3) below: YES OR NO

(1) For this year I expect that my total earnings from employment for hire and self-employment will be \$ 1500

(2) List the months since January 1 of this year in which your monthly earnings did not exceed \$100 and in which you did not render services as a self-employed person: (If none, write "None.") None

(3) Are you now working for more than \$100 a month or rendering services as a self-employed person? NO

21. Answer this question only if the employee died before January 1 of this year. YES OR NO

(a) During the preceding calendar year did you work in employment for hire? NO If "Yes," give the following information about all such employment, including employment in the railroad industry:

NAME AND ADDRESS OF COMPANY OR PERSON FOR WHOM YOU WORKED	MONTHLY EARNINGS BEFORE DEDUCTIONS FOR INCOME TAX, SOCIAL SECURITY, ETC.											
	JAN.	FEB.	MAR.	APR.	MAY	JUNE	JULY	AUG.	SEPT.	OCT.	NOV.	DEC.

(b) During the preceding calendar year were you self-employed? NO If "Yes," answer (1), (2), and (3) below:

(1) Give your net earnings from self-employment for the preceding year: \$ 300

(2) List the months of the preceding year in which you did not render services as a self-employed person:

ONE COPY AVAILABLE

-4- HX3  
APPLICANT'S AGREEMENT

A widow's or widower's insurance annuity is not payable to you for any month in which you work for a railroad or other employer covered by the Railroad Retirement Act, regardless of how much you earn.

All or part of a widow's or widower's insurance annuity is not payable to you for one or more months if while under age 72 you work in employment for hire or perform substantial services as a self-employed person and have earnings in excess of \$1200 for the taxable year. This applies to all work in employment for hire and self-employment, whether or not covered by the Social Security Act.

A widow's or widower's insurance annuity ends with the month before the month in which you remarry.

QUESTIONS 22 and 23 MUST BE ANSWERED

2. Do you agree to notify the Railroad Retirement Board promptly of the occurrence of any of the events described above? YES  
(YES OR NO)

3. Do you agree to notify the Railroad Retirement Board promptly if you receive monthly benefits under the Social Security Act based on your own employment or the employment of any other person, or if you learn you could receive such benefits upon filing an application? YES  
(YES OR NO)

REMARKS: (THIS SPACE MAY BE USED FOR EXPLAINING ANY ANSWERS TO THE QUESTIONS. IF MORE SPACE IS REQUIRED, ATTACH A SEPARATE SHEET.)

Work restrictions after 1960 explained

**CERTIFICATION:** Knowing that anyone who makes any false or fraudulent statement or claim for the purpose of causing an award or payment under the Railroad Retirement Act is committing a crime punishable under that law, I certify that the above statements are true.

NOTE: If this application has been signed by mark (X), two witnesses who know the applicant must sign below, giving their full addresses.

SIGNATURE OF APPLICANT:

*[Signature]*  
SIGN IN INK OR INDELIBLE PENCIL - DO NOT PRINT.

BX 332

(STREET AND NUMBER)

26

WILLIAMSTOWN

(ZONE NUMBER)

(CITY)

21

OSAGE

21

(COUNTY)

21

(STATE)

1. (NAME)

(STREET AND NUMBER)

(CITY) (ZONE) (STATE)

2. (NAME)

(STREET AND NUMBER)

(CITY) (ZONE) (STATE)

TELEPHONE NUMBER AT WHICH I CAN BE REACHED:

964-2652

(IF NONE, WRITE "NONE")

08

26

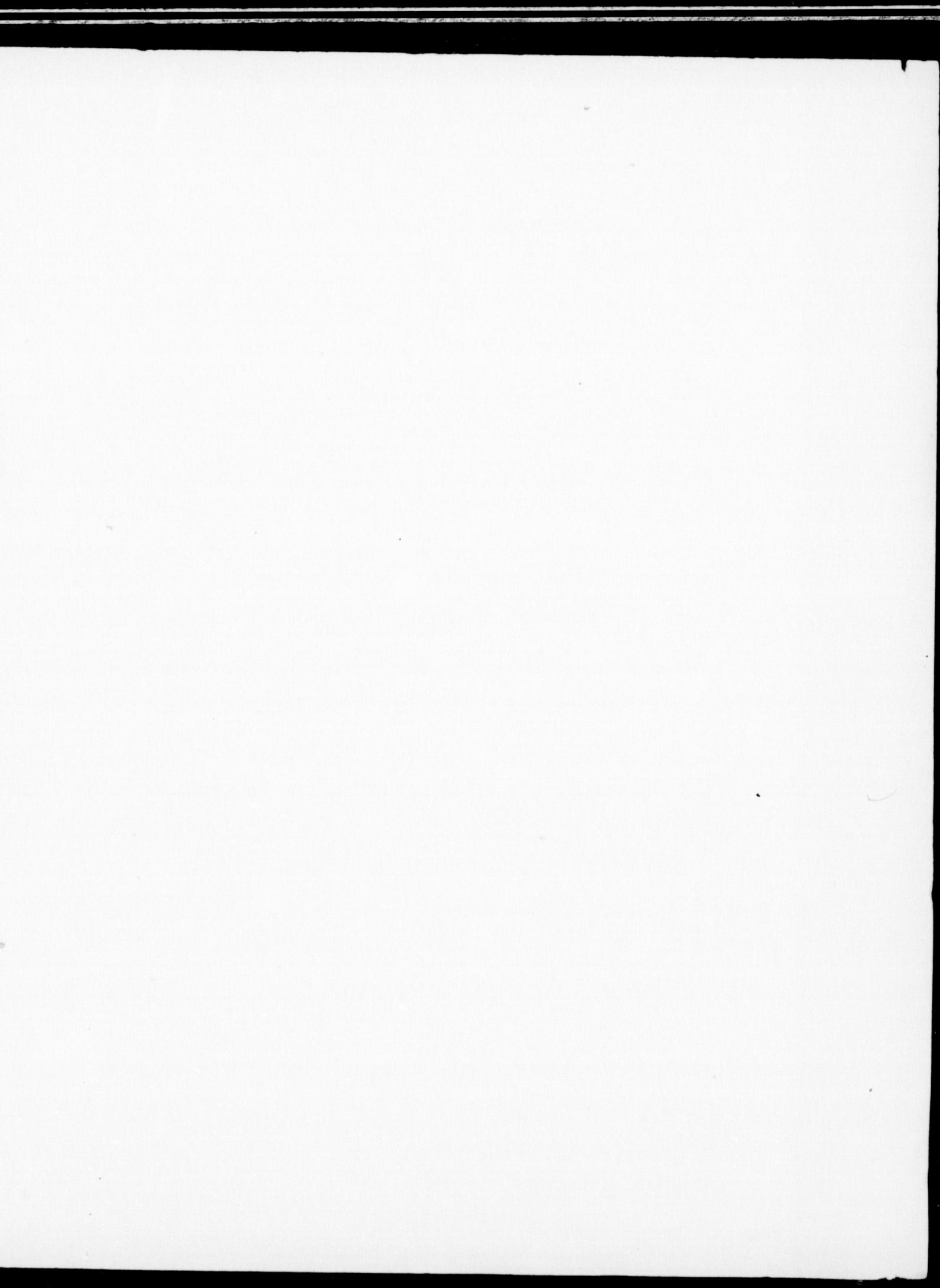
DATE SIGNED (MONTH)

(YEAR)

PENALTIES

SECTION 13 OF THE RAILROAD RETIREMENT ACT OF 1937, AMENDING THE 1935 ACT, READS IN PART: "A PERSON WHO SHALL KNOWLEDGELY MAKE OR GIVE IN WRITING ANY FALSE OR FRAUDULENT STATEMENT OR CLAIM FOR THE PURPOSE OF CAUSING AN AWARD OR PAYMENT UNDER SUCH ACTS, SHALL BE PUNISHED BY A FINE NOT MORE THAN \$10,000 OR BY IMPRISONMENT NOT EXCEEDING ONE YEAR, OR BOTH."

ONLY COPY AVAILABLE



AMERICAN

POST OFFICE DEPARTMENT  
FEDERAL BUREAU OF INVESTIGATION

Form No. 1  
(1-68)

UNITED STATES OF AMERICA  
RAILROAD RETIREMENT BOARD

SURVIVOR INSURANCE ANNUITANT'S  
REPORT  
TO RAILROAD RETIREMENT BOARD

Name of survivor  
to whom report applies

Name of deceased employee

RIN claim No.

The survivor named in 1 above:

(a)  worked for an employer in the railroad industry beginning with the month of \_\_\_\_\_  
(b)  is working and expects his total earnings from all sources (see page 2) for the taxable year to exceed \$1500. His estimated amount of earnings for the taxable year is \$\_\_\_\_\_

He worked as an employee for more than \$125 a month or rendered services in self-employment beginning \_\_\_\_\_

(c)  was married on \_\_\_\_\_

(d)  died on \_\_\_\_\_

(e)  was adopted on \_\_\_\_\_ by \_\_\_\_\_

whose relationship to child is \_\_\_\_\_

(If no relationship, state "None")

(f)  left my care and custody on \_\_\_\_\_

(g)  stopped attending school full time on \_\_\_\_\_

Signature of person making report:

(SIGNATURE)

(DATE)

STREET ADDRESS

STATE

ZIP CODE

CITY

may use this back of this form to furnish additional information or to report an event occurring any time for whom you are receiving annuities.

IF YOU WORK

IN THE RAILROAD INDUSTRY

You will not be due an annuity in any month you work, regardless of how much you earn.

OUTSIDE THE RAILROAD INDUSTRY

You will be due an annuity check in the month in which you are age 72 or older.

While you are under age 72, you will be due an annuity check for all months in which you earn no more than \$2700. If you earn more than \$1500 but not \$2700 in a year, the annuities that otherwise be payable for the year can be reduced by an amount equal to one-half earnings over \$1500. If your earnings are \$2700 in a year, the annuities that otherwise be payable for the year can be reduced by \$600 for the first \$2700 of your earnings plus the amount by which earnings exceed \$2700.

(The rules about working outside the railroad industry do not apply to a disabled age 18 or older. If he performs that type of work, notify the Railroad Retirement Board without delay and report all of his earnings.)

WHEN TO REPORT EARNINGS

NOTIFY THE RAILROAD RETIREMENT BOARD IF:

-you are working for wages of more than \$125 a month, or rendering substantial services in self-employment, and

you expect your earnings for the year to be more than \$1500.

#### WHAT TO COUNT AS EARNINGS IN A YEAR

You must count all earnings covered by the Railroad Retirement Act and the Social Security Act, as well as all earnings from any employment or self-employment not covered by either of those Acts. You must count all salaries, wages, commissions, bonuses (or other money payments), retroactive wage increases, or any allowance for room and/or board, before payroll deductions for income tax, social security, insurance premiums, etc., plus any net earnings (gross income less expenses) from self-employment. From this total, however, any net loss from self-employment may be deducted before reporting the total amount.

If you are reporting earnings for the year in which you filed your application, you must count your earnings before the date you filed as well as any expected earnings for the rest of that year.

If you are reporting for the year in which you became age 72, you must count and report all earnings for that entire year.

If you are reporting a child applicant's earnings in the year in which he became 18, or married, you must count his total earnings for that entire year.

If you are reporting the earnings of a student (age 14-21) in the year in which he became age 22, married or stopped attending school full time, you must count his total earnings for that entire year.

## HOW TO REPORT EARNINGS

Fill in Item 4(b) of the attached form, sign and date the form, and mail it promptly to the Railroad Retirement Board. Or you may tell the nearest office of the Board if you wish. Be sure to give your RRB claim number when you write.

## WHAT HAPPENS TO YOUR REPORT OF EARNINGS

When the Railroad Retirement Board gets your report of estimated earnings of more than \$1500, your annuity will be withheld for the number of months required to prevent an overpayment to you. That will avoid having to withhold your annuity later on when you may not have any earnings. In other words, prompt reporting will permit withholding payments while you are working and having other income.

*Failure to report or a late report will result in an overpayment which must be repaid.*

## OTHER REPORTS THAT ARE REQUIRED

Use the attached form to notify the Railroad Retirement Board (or tell the nearest office of the Board) if:

--Any person receiving an annuity works for an employer in the railroad industry.

--A widow, widower, or parent receives

--A child receiving an annuity marries, dies, is adopted, enters military service, or leaves his present care and custody.

--A child age 18 or older receiving an annuity recovers from his disability.

--A child age 18-21 who is included in the computation of your annuity because he is attending school, marries, dies, is adopted, or stops attending school full-time (except for a normal vacation period of 4 months or less).

## SPECIAL NOTICE

If you are receiving your own annuity, you must report the events that affect your own payments. If you are receiving an annuity for someone else (for a child, or for an adult who is unable to handle his own funds), you are responsible for knowing the conditions under which that annuity can be paid and for making all the required reports.

## FOR FURTHER INFORMATION

If you have any questions about the material in this pamphlet and you live in the United States, call at or write the office of the Railroad Retirement Board nearest you. If you live outside the United States, consult the nearest consular office of the State Department of the United States.

ONLY COPY AVAILABLE

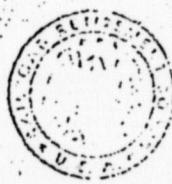
A-48

SURVIVOR  
INSURANCE  
ANNUITY

when not payable

and

when payable for only some months



WHEN AN EVENT OCCURS THAT  
AFFECT ANNUITY PAYMENT  
COMPLETE AND RETURN THIS FORM

U. S. RAILROAD INSURANCE  
615 North Dearborn  
Chicago, Illinois

ONLY COPY AVAILABLE

FORM 72-43 (11-54)	When Writing to the Board, Always Give: THE DECEASED EMPLOYEE'S NAME and THIS CLAIM NO. → A-675816	DATE SEP 1 1966
U. S. RAILROAD RETIREMENT BOARD 344 PUSH STREET, CHICAGO, ILLINOIS 60611		
NOTICE OF INSURANCE ANNUITY AWARD		

An insurance annuity has been awarded under the Railroad Retirement Act to each person listed below.

<u>Name</u>	<u>Monthly Rate</u>	<u>Beginning</u>
Kathleen M. Finnerty	\$63.40	August 1, 1966

The enclosed check covers the amount due through August 31, 1966.

Succeeding checks will be mailed to reach you during the first week of each month and will cover the amount due for the preceding month.

Should you have any questions about your annuity, contact the nearest office of the Board. If you call in person, please take along this notice and any other material you have regarding your claim.

Enclosures

Check

G-74

ns 9-12-66

BE SURE TO READ THE BACK OF THIS NOTICE AND THE ENCLOSURE FOR OTHER IMPORTANT INFORMATION

*D. M. Smith*

D. M. Smith  
Director of Retirement Claims

**IMPORTANT**

This annuity is based on the employee's railroad earnings and social security earnings, if any. Therefore, no benefits are payable under the Social Security Act.

**YOU MUST NOTIFY THE RAILROAD RETIREMENT BOARD PROMPTLY** if any event occurs which would affect payment of this annuity. These events are explained in the enclosed pamphlet, which you should **READ CAREFULLY**.

**ANNUITY CHECKS** are mailed to you by the Treasury Department. If you receive an annuity check (other than a combined check for multiple beneficiaries) for any month for which the annuity should not be paid, return the check to the

Treasury Department  
P. O. Box 8670  
Chicago, Illinois 60680

**IF YOU CHANGE YOUR ADDRESS**, notify the Railroad Retirement Board and your local post office immediately so that your monthly checks will not be delayed. To notify the Board, you may use the form printed on the back of your check envelope.

An applicant for benefits under the Railroad Retirement Act may appeal to the Appeals Council of the Board if he does not agree with the decision on his claim. If an appeal is made, it must be submitted on the form provided by the Board and must be received at an office of the Board within one year from the date of this notice.

**ALWAYS GIVE YOUR CLAIM NUMBER AND THE DECEASED EMPLOYEE'S NAME WHEN WRITING TO US**

AB-1 (11-54)

U.S. RAILROAD RETIREMENT BOARD  
844 RUSH STREET, CHICAGO, ILLINOIS 60611  
NOTICE OF INSURANCE ANNUITY ADJUSTMENT

When Writing to the Board, Always Give  
THE DECEASED EMPLOYEE'S NAME

DATE

and  
THIS CLAIM NO. 2-A-675316

The monthly annuity payments in this case have been reinstated for the reason(s) checked below. The unchecked explanations do not apply.

- A child attained age 18.
- A child age 18-21 is a full-time student. Annuity payments will be made directly to the child.
- You are now eligible for social security benefits.
- You expect your total earnings for the taxable year to exceed \$1,680.
- An overpayment of \$133.00, based on a report that you earned \$1946.60 in 1970, has been recovered.

Benefits will now be paid as follows:

Name	Monthly Rate	Effective Date
Kathleen M. Finnerty	\$62.65	6-1-72

The enclosed check covers the amount due through 7-31-72, less an overpayment of \$133.00 made to you. Succeeding checks will be mailed to reach you during the first week of each month and will cover the amount due for the preceding month.

Should you have any questions about your annuity, contact the nearest office of the Board. If you call in person, please take along this notice and any other material you have about your claim.

Enclosure  
Check

*D. M. Smith*

D. M. Smith  
Director of Retirement Claims

bk 8 4

BE SURE TO READ THE BACK OF THIS NOTICE FOR OTHER IMPORTANT INFORMATION

**IMPORTANT**

**YOU MUST NOTIFY THE RAILROAD RETIREMENT BOARD PROMPTLY if any event occurs which would affect payment of this annuity.**

**ANNUITY CHECKS** are mailed to you by the Treasury Department. If you receive an annuity check (other than a combined check for multiple beneficiaries) for any month for which the annuity should not be paid, return the check to the

Treasury Department  
P.O. Box 8670  
Chicago, Illinois 60680

**IF YOU CHANGE YOUR ADDRESS**, notify the Railroad Retirement Board and your local post office immediately so that your monthly checks will not be delayed. To notify the Board, you may use the form printed on the back of your check envelope.

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An applicant for benefits under the Railroad Retirement Act may appeal to the Office of Hearings and Appeals of the Board if he does not agree with the decision on his claim. If an appeal is made, it must be submitted on the form provided by the Board and must be received at an office of the Board within one year from the date of this notice.

**ALWAYS GIVE YOUR CLAIM NUMBER AND  
THE DECEASED EMPLOYEE'S NAME WHEN WRITING TO US**

AB-2 (1-71)

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

KATHLEEN FINNERTY, individually and  
on behalf of all other persons similarly situated, -----x

Plaintiff, -----:

-against- : AFFIDAVIT OF SERVICE BY MAIL

JAMES L. COWEN, individually and as Chairman of the Railroad Retirement Board; and CASPAR WEINBERGER, individually and as Secretary of Health, Education & Welfare, -----:

Defendants. -----x

STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss.:

LAURA VILLAFANE being duly sworn, deposes and says:

Deponent is not a party to the above action, is over 18 years of age and resides at 316 West 94th Street, N.Y.C.

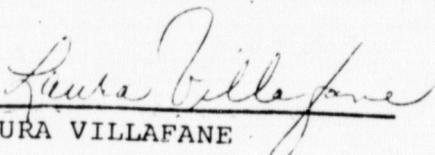
That on the 31st day of May , 1974, deponent served the within Appellant's Brief & Joint Appendix

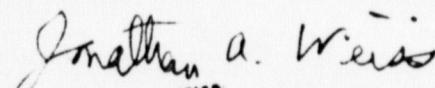
upon Brian F. Mumford, Asst. U.S. Att'y., U.S. Dept. of Justice, U.S. Courthouse & Post Office, Northern Dist. of N.Y., Albany, N.Y. 12207,

the address designated by said attorney for that purpose by depositing a true copy of same in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me this  
31st day of May 1974.

LAURA VILLAFANE





JONATHAN A. WEISS  
Attala of New York

JONATHAN A. WEISS  
Attala of New York

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